In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6314

JAMES ROY GOSA, PETITIONER

v.

J. A. MAYDEN, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (A. 35-72)[1] is reported at 450 F.2d 753. The opinion of the district court (A. 30-33) is reported at 305 F. Supp. 1186.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1971. Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to March 10, 1972, and the petition was filed on March 9,

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[1] "A." references are to the Appendix filed in this Court.

1972; it was granted on June 19, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the holding of *O'Callahan* v. *Parker*, 395 U.S. 258, should be applied retroactively to invalidate a conviction that had become final before the date of that decision.

STATEMENT

Following a general court-martial in December 1966, petitioner, then an airman third class stationed at Warren Air Force Base in Wyoming, was convicted of having committed rape, in violation of 10 U.S.C. 920 (Article 120 of the Uniform Code of Military Justice). He was sentenced to ten years' incarceration at hard labor, forfeiture of all pay and allowances, a reduction in rank to the grade of Airman Basic and a bad conduct discharge (A. 3, 22). On March 10, 1967, the Staff Judge Advocate recommended that the findings and sentence of the general court-martial be approved (A.5-21); the following day, they were approved by the convening authority (A. 22-23). On review by an Air Force Board of Review, pursuant to 10 U.S.C. 866 (Article 66, U.C.M.J.), the conviction and sentence were affirmed (A. 24-25). The United States Court of Military Appeals denied a petition for review on August 16, 1967 (A. 26).

The material facts in this case are not in dispute. As set forth in the opinion of the Staff Judge Advocate (A. 5-12), on August 13, 1966, petitioner accosted and raped a civilian in Cheyenne, Wyoming; the victim was not in any way connected with the military or related to

military personnel. The offense took place away from Warren Air Force Base, at a time when petitioner was officially off-duty and was absent from the base on an authorized leave; he was dressed in civilian clothes. Shortly after the rape, petitioner was arrested by civilian authorities, and, unable to make bond, was detained until a preliminary hearing was held in the state court on September 23, 1966. Following the hearing, he was released for failure of the victim to appear. He was immediately taken into military custody and charged with violating Article 120, U.C.M.J. The victim testified at petitioner's court martial, and he was convicted.[2] Sentence was adjudged on December 2, 1966 (A. 22), and the conviction became final on August 16, 1967, when the United States Court of Military Appeals denied review (A. 26).

On June 2, 1969, this Court decided *O'Callahan* v. *Parker,* 395 U.S. 258, invalidating the court-martial conviction of a serviceman for a non-service-connected offense (assault with attempt to commit rape) on the ground that he had been denied his constitutional rights to indictment by a grand jury and to trial by jury in a civilian court. Petitioner then instituted this habeas corpus action in the United States District Court for the Northern District of Florida, relying on *O'Callahan* and seeking release from his present confinement at the

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[2] The victim testified that she had not appeared in the state proceedings "because she did not want the publicity and she didn't want to get [another man] involved in it. Further, she was supposed to be out of town because the police had told her to leave. She had been convicted of shoplifting in May of 1966" (A. 10).

Federal Correctional Institute, Tallahassee, Florida.[3] The district court denied the writ (A. 30-33). While finding the rape offense, on the particular facts of this case, to be non-service-connected, it held that *O'Callahan* was not entitled to retrospective application under the tripartite interest balancing test formulated in *Stovall* v. *Denno*, 388 U.S. 293. A divided court of appeals (A. 35-72) affirmed.[4]

ARGUMENT

This case raises the question left open in *Relford*: whether *O'Callahan* should be given retroactive effect to upset countless court-martial convictions (such as the one here) that have been rendered over many years under the mandate of Congress. We have fully briefed that issue in *Warner* v. *Flemings*, No. 71-1398 (Pet. Br. 11-38), the companion case to this one.[5] For the reasons set forth at length in our *Flemings* brief, we submit that the new constitutional principle announced in *O'Callahan*, if adhered to, should be applied only prospectively.[6]

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[3] On November 6, 1969, petitioner also filed a motion in the United States Court of Military Appeals to vacate his conviction and sentence, also relying on *O'Callahan*. Treating the motion as a petition for reconsideration, the military court denied relief (A. 27-29; 19 U.S.C.M.A. 327, 41 C.M.R. 327). It relied on its previous decision in *Mercer* v. *Dillon*, 41 C.M.R. 264, 19 U.S.C.M.A. 264, holding that *O'Callahan* does not apply to cases which had become final before the date of that decision.

[4] It was stipulated in the court below that the petitioner's rape of a civilian was, in view of the surrounding circumstances, a non-service-connected crime. Compare *Relford* v. *Commandant*, 401 U.S. 355.

[5] A copy of our brief has been furnished to petitioner.

[6] The court-martial conviction in this case, unlike *Flemings*, took place after enactment of the 1950 Uniform Code of Military Justice.

Whether, as we urge in our brief in *Flemings* (p. 38, n. 34), *O'Callahan* should at most apply to court-martial trials begun after the date of that decision, or whether it should also apply to proceedings that were then pending at any stage of trial or review, that decision should not be applied to petitioner's conviction, which had become final nearly two years before *O'Callahan* was decided.

1. Petitioner seems to make two basic arguments in favor of retroactivity. The first is that the court martial that tried him had no "jurisdiction" under the Constitution to try him. In our brief in *Flemings* (pp. 11-17), we set forth why we believe the references to a jurisdictional basis for the decision in *O'Callahan* do not resolve the retroactivity inquiry. As we there argue, whatever may be the import of the jurisdictional language of that opinion, the fundamental analysis to be used in deciding whether the decision has retroactive effect remains the same as in other retroactivity cases.

2. Petitioner's second major point concerns one of the three traditional factors this Court has determined to be relevant in making the retroactivity decision: what would be the impact of retroactive application on the administration of justice. (No discussion is offered on the other two relevant factors: the purpose of the constitutional rule announced in *O'Callahan* and the extent of justifiable government reliance on the pre-*O'Callahan* law.) The essential thrust of the argument seems to be that the alleged administrative and judicial burdens that would likely flow from such a holding—

That distinction, however, as we point out in our brief in *Flemings* (Pet. Br. 27-29), should not be determinative in deciding how *O'Callahan* should be applied.

which is one of the factors that the court below found weighed against retroactivity (A. 65-67)—have been vastly overstated.

It is, of course, impossible at this time to assess in absolute terms the impact on both the military and the civilian courts of a decision in this case in favor of retroactivity. But, as we have shown in our brief in *Flemings* (pp. 33-38), the potential administrative and judicial burdens likely to result from such a holding appear considerable. Petitioner's argument to the contrary rests essentially on several observations made in the Blumenfeld article, *Retroactivity After O'Callahan: An Analytical and Statistical Approach,* 60 Geo. L.J. 551 (1972). As even the observations petitioner cites illustrate, however, there is a substantial administrative burden in ascertaining—or trying to ascertain—whether a particular offense is "service connected"—a process that in a sense has been complicated by the enumeration of a dozen relevant factors in the Court's recent decision in *Relford.* Even if relief under *O'Callahan* (and *Relford*) would ultimately be awarded only in a relatively small percentage of the many hundreds of thousands of outstanding court-martial convictions, the process of administratively reconstructing the relevant factors and judicially reviewing the assessment must plainly be regarded forbidding.

"Moreover," as we stated in *Flemings* (p. 38), "even the possibility that the number of convictions actually challenged might turn out to be fewer than seems likely should not materially discount the significance of the impact of a holding of retroactivity, since the 'purpose' and 'reliance' factors, as we have shown [see our brief

in *Flemings* at pp. 19-33], so strongly counsel against imposing the burden."

3. In view of the similarities between this case and *O'Callahan,* the Court may wish to reconsider that decision, which was rendered when less than the full Court was available to pass upon the extremely important constitutional question involved: whether a serviceman on active duty and unquestionably subject to general military discipline can properly be courtmartialed for criminal conduct that is not "service connected."

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our brief in *Warner* v. *Flemings,* it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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